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COURT OF CRIMINAL APPEALS
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No. PD-0041-17

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

REX ALLEN NISBETT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Williamson County

* * * * *

STATE'S BRIEF ON THE MERITS

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Rex Allen Nisbett.

*The case was tried before the Honorable Billy Ray Stubblefield, Presiding Judge of the 26th District Court in Williamson County, Texas.

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

REX ALLEN NISBETT, Appellant

v.

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* * * * *

STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The rules for sufficiency review are simple. Look at all the evidence. Together. Like the jury did. And then ask if the elements of the offense were proven beyond a reasonable doubt. This Court has rejected many concepts and constructs for their inconsistency with these rules. It should reject those adopted by the court of appeals for the same reason. When the evidence is viewed properly, the State proved what it needed to prove—the elements of the offense.

STATEMENT OF THE CASE

Appellant was convicted of murder and sentenced to 42 years in prison.[1] The court of appeals reversed, holding that even if the State proved the victim's death

[1] 1 CR 216.

"there is no evidence of the criminal act that caused [it] or that appellant perpetrated that criminal act."[2] And if there were, the State "wholly failed to provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* appellant possessed when he did that something . . . was the requisite *mens rea* for murder, as opposed to some other mens rea."[3]

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument. Appellant requested argument in his response, but argument was not granted.

ISSUES PRESENTED

1) **In the absence of a body, must the State prove the "fatal act of violence" in order to convict someone of murder?**

2) **The court of appeals reviewed both the evidence and the elements of the offense in sequential, piecemeal fashion rather than cumulatively, and failed to respect the jury's prerogative to draw inferences and weigh testimony.**

3) **Is the evidence sufficient to prove appellant murdered his wife?**

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[2] *Nisbett v. State*, No. 03-14-00402-CR, 2016 Tex. App. LEXIS 13252, at *45 (Tex. App.—Austin, Dec. 15, 2016).

[3] *Id*. at *49.

STATEMENT OF FACTS[4]

An unhappy marriage about to end.

Vicki Nisbett disappeared on December 14, 1991.[5] Vicki and appellant were married and had three kids.[6] They also had periodic marital problems. Vicki contemplated divorce more than once.[7] Appellant told a co-worker he thought about killing her after he caught her cheating but said it "wouldn't be the Christian thing to do."[8] While walking through his brother's property with Vicki's brother Mark, appellant pointed out a number of excavation holes and said, "You could throw a body in there and no one would ever find it."[9] Appellant twice told Mark that he would kill her if she tried to divorce him and take the kids.[10]

At the time of her disappearance, appellant and Vicki were in the process of getting a divorce.[11] Appellant was served on November 15, 1991.[12] She moved into

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4 In the light most favorable to the verdict.

5 8 RR 92.

6 8 RR 38.

7 9 RR 89.

8 9 RR 70.

9 9 RR 84-85.

10 9 RR 85, 89, 93-94.

11 8 RR 40.

12 8 RR 120-21.

an apartment with the kids by Thanksgiving,[13] opened her own bank account,[14] and started seeing other men.[15] Despite the situation, Vicki let appellant move in with them temporarily so he could be with the kids during Christmas.[16] This caused her stress; Vicki met with her pastor a few days before she disappeared, in tears, "extremely fearful," and "afraid."[17] He offered to find her a place "for women to go to, to get away from moments when they're feeling this fear," but she did not take him up on it.[18]

Violence the day she disappeared.

Vicki had plans to go to an office Christmas party that night with Julie Coen Tower, a friend/coworker.[19] When Julie called that afternoon, Vicki was agitated and upset because of an argument with appellant about the party.[20]

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[13] 8 RR 39.

[14] 8 RR 180.

[15] 8 RR 77.

[16] 8 RR 121.

[17] 8 RR 103-04, 110.

[18] 8 RR 110-11.

[19] 8 RR 51, 65.

[20] 8 RR 65-66.

Sometime after 5:00 p.m., Vicki received a call from Wayne Castleberry, whom she had recently started seeing.[21] Appellant repeatedly picked up the other line to listen in, and accused her of talking about him.[22] After he told her in a harsh, loud voice to get off the phone, Vicki's voice and demeanor changed, and she told Wayne she had to go.[23] Vicki had previously told Wayne that she would like to see him more after appellant moved out, and they were going to try to get together that weekend with "a bottle of wine or something like that."[24] Wayne never heard from her again.[25]

When Julie called again to confirm their plans, Vicki and appellant were still arguing.[26] A hysterical Vicki told Julie that appellant choked her.[27] Julie told her to get her stuff and come over immediately.[28] When Julie called again after Vicki should have arrived, appellant told Julie that Vicki had just left.[29] When Julie called

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[21] 8 RR 73-74, 77.

[22] 8 RR 80.

[23] 8 RR 80.

[24] 8 RR 80-81.

[25] 8 RR 81-82.

[26] 8 RR 66.

[27] 8 RR 66.

[28] 8 RR 66.

[29] 8 RR 66-67.

again 30 minutes later, appellant told her that Vicki went straight to the party.[30] Vicki never arrived at the party.[31]

Appellant's lies.

Appellant initially told officers he did not have a physical altercation with Vicki the night she disappeared, but claimed upon further questioning that he pushed her when she approached him angrily.[32] He also told them he was home with his kids the entire night of Vicki's disappearance.[33] That was another lie. Sometime that evening, appellant asked a neighbor he barely knew to borrow his car and watch the boys.[34] Appellant was gone one to one and half hours while that neighbor watched the boys in Vicki's apartment.[35]

That neighbor noticed the next day that the trunk lock of his car was "beat out of" the deck lid.[36] The trunk and ignition had separate keys.[37] He also noticed that

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[30] 8 RR 67.

[31] 8 RR 68.

[32] 8 RR 96-97, 122.

[33] 8 RR 121-22.

[34] 9 RR 28-29, 32, 53.

[35] 9 RR 56, 58. The neighbor's sister rented movies for them to watch; the receipt says 7:52 p.m. 9 RR 56; State's Ex. 42 (receipt).

[36] 9 RR 32-33, 43.

[37] 9 RR 33.

it had damage to the headlamps and front trim.[38] Appellant's brother Michael had brushy, hill country property near where Highway 71 and the Pedernales River come together today.[39] Back then, the primary route there would have been Highway 620, which was easily accessible from Vicki's apartment.[40]

Vicki's car.

Shortly after 9:30 p.m. on the night she disappeared, an officer ran the plates on Vicki's car as it headed north on Highway 183 not far from her apartment.[41] This pointed away from downtown, where the party was.[42] Its driver—the only visible occupant—had short or collar-length dark hair but the officer could not identify whether that person was male or female.[43]

Appellant was "a little upset and concerned" when police released Vicki's license plate information in an attempt to find it.[44] Vicki's car was missing for two months until it appeared in an area HEB parking lot.[45] When it was found, he refused

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38 9 RR 32-33, 43.

39 12 RR 76-78; Def. Ex. 2 (photo of dense brush on property).

40 12 RR 77. *See* State's Ex. 43 (map).

41 9 RR 104-05; State's Ex. 43 (map).

42 8 RR 65.

43 9 RR 110.

44 8 RR 149.

45 8 RR 148-49.

consent to search even though his name was also on the registration.[46] When it was searched, Vicki's checkbook was found inside.[47] There was an out-of-sequence check missing from it that was used by appellant, who forged her signature to buy gas five days after her disappearance.[48] Also, the interior dome light was removed, making it so that there would be no light when a door is open.[49]

Shifting focus.

Vicki's supervisor called to report her missing before appellant did.[50] When he first spoke to officers, he said Vicki had "ran off with some man" but would return by Christmas.[51] On a later date, he told them he "felt very sure" she was with a girlfriend in Galveston.[52] Sometime in the six weeks during which he remained in Vicki's apartment, he told Vicki's mother that he did not know where she was.[53] However, during this period Julie saw a couple of pictures of Vicki on the kitchen

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[46] 8 RR 149.

[47] There was no incriminating forensic evidence found in Vicki's car. 10 RR 44, 68-69. The neighbor's Nova was not "processed," 10 RR 69, although some officers looked at it. 9 RR 43.

[48] 8 RR 135-36. State's Ex. 6 (check number 698, written December 20), 96 (enhanced photograph of interior of Vicki's car showing a checkbook with first check numbered 676).

[49] 8 RR 150.

[50] 8 RR 114-15.

[51] 8 RR 122, 128.

[52] 8 RR 128.

[53] 8 RR 41.

counter and a lit candle, "like a shrine."[54] When serial killer Kenneth McDuff hit the papers in April of 1992, he immediately approached law enforcement to say he must have killed her.[55] Appellant told Vicki's mother the same thing that May.[56]

More lies

It was several more months before Vicki's mother was permitted to see her grandchildren; appellant claimed he had to protect himself.[57] He told both her and police that he spent large sums of money on a private investigator to find her, but there is no evidence of it.[58] In fact, he had to ask Julie to buy him Triaminic for one of the boys in the weeks following Vicki's disappearance because he had no money.[59] He also told police he was going to print posters and place them at area gas stations and McDonald's, but they saw no such efforts.[60]

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[54] 8 RR 68-69.

[55] 8 RR 156-57.

[56] 8 RR 41, 43-44.

[57] 8 RR 45.

[58] 8 RR 41-42, 132.

[59] 8 RR 68.

[60] 8 RR 132.

Suspicious behavior

Police suspected appellant disposed of Vicki's body nearby and hoped that telling him they found her body would lead them to it.[61] Once told, he left the apartment twice to pace the parking lot, and then waited for a female to pick him up.[62] They drove up Highway 183, where Vicki's car was seen the night she disappeared, past several large wooded areas, and ended up at an elementary school where he went inside for a few minutes.[63] A part of that "enormous" wooded area was searched with no results.[64]

Never a denial.

The Chief deputy of Corrections spoke to appellant after he was booked in after indictment.[65] When he told appellant he believed appellant murdered Vicki, appellant's only response was, "That new DA said I'm homeless."[66] He never denied the allegations.[67] In the fifteen months during which his brother Brooks visited or spoke with appellant prior to trial, appellant complained three times about being

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[61] 8 RR 147-48. Unmarked cars were stationed in and around the apartment complex to follow him. 8 RR 147-48.

[62] 8 RR 148. His vehicle was "broke down." 8 RR 148.

[63] 8 RR 148.

[64] 8 RR 148.

[65] 8 RR 113, 160.

[66] 8 RR 161.

[67] 8 RR 161.

called homeless but not once about being called a murderer, nor did he tell Brooks he did not do it.[68]

Without a trace.

Vicki deposited her last paycheck the day before her disappearance and has not written a check on that account since.[69] Forensic on-line searches of multiple law enforcement databases using various pieces of identifying information and records revealed no activity since she went missing.[70] More importantly, all the evidence showed she was a loving mother and daughter who would never abandon her children or other loved ones.[71] Vicki's mother has not heard from her since she disappeared.[72]

The scene of the crime.

Two days after she disappeared, appellant permitted officers to "glance around" her apartment.[73] Vicki's bedroom was upstairs and its interior was out of view from the bottom of the stairs.[74] One officer had been there on two prior occasions.[75]

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[68] 12 RR 52-53.

[69] 8 RR 134-35, 181.

[70] 11 RR 56-59.

[71] 8 RR 47, 69, 111; 9 RR 87-88.

[72] 8 RR 46. Her sons did not testify.

[73] 8 RR 96.

[74] 8 RR 218; State's Ex. 38 (diagram of upstairs).

[75] 8 RR 87, 93, 100.

Whereas before it was in "disarray," now it was "in extremely pristine condition" and "immaculate."[76] There were not any noticeable quantities of Vicki's clothing missing, and her grooming and beauty items were still there.[77]

Appellant was not on Vicki's lease, so he was evicted from her apartment six weeks after her disappearance.[78] He told Vicki's mother that he did not find any blood in the apartment when he "cleaned it thoroughly," which he said occurred just before he moved out.[79] After he moved out, law enforcement obtained consent from the apartment manager to search.[80] Appellant showed up unexpectedly at 6:30 on the evening of the search.[81] Although he assured the officers they were wasting their time, "he was extremely nervous; his face was broke (sic) out in a sweat" despite the cool January weather.[82] He reappeared at 9:30 to see what they had found, and again said he hated to see them do all that work for nothing.[83] Because he was curious about their findings, appellant was told he could come by the station the next day to

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[76] 8 RR 87, 93, 100.

[77] 8 RR 94, 95. Even appellant said she only had a single change of clothing when she left. 8 RR 89.

[78] 8 RR 138, 177.

[79] 8 RR 41-42.

[80] 8 RR 138-39.

[81] 8 RR 139.

[82] 8 RR 139.

[83] 8 RR 140.

look at the preliminary report.[84] He never showed up.[85] Instead, his attorney called to tell them not to speak to appellant anymore.[86]

The search revealed blood stains on the carpet padding in her bedroom closet and a bloody hand print on the wall by the light switch.[87] The blood in the closet was Vicki's.[88] Based on blood's viscosity, it would have taken a fair amount to soak through to the pad.[89] The hand print on the wall was appellant's.[90] It was made in Vicki's blood.[91]

SUMMARY OF THE ARGUMENT

Instead of viewing the evidence cumulatively in the light most favorable to the verdict to determine whether the State proved the elements of murder beyond a reasonable doubt, the court of appeals created its own conceptual framework to view the offense and evidence in a piecemeal fashion. The result is the arbitrary requirement that the State prove the "fatal act of violence" before any circumstantial

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[84] 8 RR 140.

[85] 8 RR 140.

[86] 8 RR 140.

[87] State's Ex. 14 (photograph of wall), 16-17 (photographs of carpet padding) 52-58 (photographs of enhanced prints)

[88] 11 RR 48-50 (biological child of Vicki's parents), 12 RR 15-18.

[89] 10 RR 77.

[90] 10 RR 130, 141-45.

[91] 12 RR 15-18.

evidence that otherwise supports the verdict can be considered. Although there are some questions that remain unanswered, when viewed properly the evidence shows that appellant murdered his wife as alleged in the indictment.

ARGUMENT

I. *Jackson v. Virginia* is the only standard.

Ever since *Brooks v. State* ended this Court's experiment with factual sufficiency review, the only standard an appellate court should apply when determining whether the evidence is sufficient to support a criminal conviction is that in *Jackson v. Virginia*.[92] As the Supreme Court stated, "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."[93] "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[94]

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[92] *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality) (*overruling Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). *See Jackson v. Virginia*, 443 U.S. 307 (1979).

[93] *Jackson*, 443 U.S. at 319 (emphasis in original).

[94] *Id*.

A history of rejection.

Since *Jackson*, this Court has reconsidered many rules for sufficiency review including some concepts, like factual sufficiency review, that were created after *Jackson*. All have been abandoned as inconsistent with that standard. These rules range from the most general to offense-specific.

The Court has changed how certain evidence is treated.

Juries used to be instructed to eliminate all reasonable alternative hypotheses before convicting on circumstantial evidence. In *Hankins v. State*, this Court recognized that "direct and circumstantial evidence are equally probative,"[95] and rejected the instruction as "a confusing and improper charge where the jury is properly instructed on the reasonable doubt standard of proof."[96]

The Court has eschewed "helpful" constructs.

Even after *Hankins*, the Court retained the reasonable alternative hypothesis theory as a helpful "analytical construct" for reviewing circumstantial evidence cases.[97] In *Geesa v. State*, it recognized its numerous flaws and resolved to measure

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[95] *Hankins v. State*, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983) (reh'g).

[96] *Id*. at 199-200.

[97] *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991) (*overruled on other grounds*, *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000)). *See Butler v. State*, 769 S.W.2d 234, 238 n.1 (Tex. Crim. App. 1989) ("We recognize that the United States Supreme Court declined, in *Jackson*, to adopt this theory as part of the *Jackson* standard for review. Likewise, we do not mean (continued...)

evidence according to the *Jackson* standard.[98] That was good, because "mental culpability is of such a nature that it generally must be inferred from the circumstances under which a prohibited act or omission occurs."[99]

This Court has also addressed constructs that are offense specific. One is "the so-called 'affirmative links' rule," which was created to protect innocent bystanders from conviction for someone else's possession of drugs.[100] Some courts of appeals list as many as 16 circumstances that "link" a person to drugs.[101] But "ultimately the inquiry remains that set forth in *Jackson*: Based on the combined and cumulative force of the evidence and any reasonable inferences therefrom, was a jury rationally justified in finding guilt beyond a reasonable doubt?"[102]

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[97](...continued)
to imply an adoption of this theory as the standard of review for sufficiency of the evidence. The reasonable hypothesis theory as utilized by this Court is merely an analytical construct to facilitate the application of the *Jackson* standard.").

[98] *Geesa*, 820 S.W.2d at 159-61.

[99] *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991).

[100] *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006).

[101] *Tate v. State*, 463 S.W.3d 272, 275-76 (Tex. App.–Ft. Worth 2015), *rev'd*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016).

[102] *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016).

The Court has changed how it views the State's burden.

In years past, proof of guilt was "divided conceptually into three parts": proof of a specific injury or loss, proof that it was criminal, and proof of identity.[103] The first two form the *corpus delicti*.[104] In an extrajudicial confession case, such confession could not support conviction without independent evidence of the *corpus delicti*.[105] But the concept has not always been so circumscribed. In *Carrizales v. State*, this Court clarified that "proof of the *corpus delicti* in non-confession cases is wholly subsumed by the *Jackson* elements test."[106] "The State d[oes] not have to prove any *corpus delicti*, it ha[s] to prove every element of the . . . offense beyond a reasonable doubt."[107] "Mention of the *corpus-delicti* doctrine in a *Jackson* sufficiency review when the case does not involve a confession is, at best, just short

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[103] *Carrizales v. State*, 414 S.W.3d 737, 741 (Tex. Crim. App. 2013) (citation omitted).

[104] *Id*. at 741.

[105] *Id*. at 741-42.

[106] *Id*. at 744. Even what is left of the *corpus delicti* rule has been narrowed in both scope and rationale. In *Miller v. State*, the Court found the underlying purpose to be "narrow" but it refused to abandon it because it "provides essential protection" for "defendants who would confess to an imaginary crime because of mental infirmity or for other reasons." 457 S.W.3d 919, 926 (Tex. Crim. App. 2015). It did, however, agree to adopt a "closely related crime exception" that satisfies the *corpus delicti* rule when one of a series of offenses confessed to is corroborated and "the temporal connection between the offenses confessed to is sufficiently close." *Id*. at 927, 929.

[107] *Carrizales*, 414 S.W.3d at 744.

hand for 'evidence that the crime has been committed,' and, at worst, confusing."[108]

The Court is right to maintain the pure simplicity of *Jackson*.

This Court's reluctance to perpetuate old sufficiency constructs or embrace new ones that deviate from the simple rules set forth in *Jackson* is justified. Nothing good happens when a court attempts to formalize some aspect of the *Jackson* standard with a "helpful construct" or list of potential evidence. At best, they are confusing. At worst, they violate *Jackson*. Conceptualized quasi-elements like injury, criminality, and identity engender compartmentalization of the evidence rather than cumulative consideration. And lists of circumstances invite a box-checking approach regardless of how many times the reader is told not to do it.

Take "affirmative links," for example. The Court wrote in 1995 that "the so-called 'affirmative links' doctrine never actually acquired any of the characteristics typical of a legal rule. . . . It is still, just as it always was, only a shorthand expression of what must be proven to establish that a person possessed some kind of drug 'knowingly or intentionally.'"[109] Yet this Court granted review in *Evans v. State*

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[108] *Id*. *McDuff v. State*, 939 S.W.2d 607 (Tex. Crim. App. 1997), discussed at length below, is a good example of repeated use of the term despite making it clear that the *Jackson* test must be used to determine whether all the evidence collectively permitted a rational jury to find "the essential elements of the crime beyond a reasonable doubt." *Id*. at 614-16.

[109] *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

eleven years later to curb its abuse,[110] and in *Tate v. State* a decade later to do the same thing.[111] *Tate* will not be the last case in which this Court must say, "The affirmative-links analysis is not a distinct rule of legal sufficiency."[112] That is why some judges have suggested the term be abandoned.

This Court should continue to insist upon a plain application of the *Jackson* standard: look at all the evidence collectively and in the light most favorable to the jury to see whether the elements—the only thing the State has to prove—were proven beyond a reasonable doubt.

II. The State need only prove the elements of the offense.

Appellant was charged under both TEX. PENAL CODE § 19.02(b)(1) and (b)(2). Under (b)(1), "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual[.]"[113] Under (b)(2), "A person commits an offense if he . . . intends to cause serious bodily injury and commits an act clearly dangerous

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[110] *Evans*, 202 S.W.3d at 164 (detailing analysis of "links" in isolation, reliance on alternative inferences for almost every piece, disregard of evidence, focus on absence of other "links"), 164 n.19 (citing *Jackson*).

[111] *Tate*, 500 S.W.3d at 417 ("the court of appeals incorrectly applied the *Jackson* standard[; t]he court of appeals analyzed each circumstance of guilt in isolation without considering the cumulative force of all of the evidence.").

[112] *Id*. at 414 n.6 (calling it, like the alternative reasonable hypothesis was once called, "a helpful guide to applying the *Jackson* legal-sufficiency standard of review in the context of circumstantial evidence cases.").

[113] TEX. PENAL CODE § 19.02(b)(1).

to human life that causes the death of an individual."[114] The State alleged that the cause of death was by unknown manner and means.[115] There is a substantial body of law detailing exactly what the State must—and need not—prove to sustain a murder conviction.

What must be proven.

"[M]urder is a result-of-conduct crime."[116] "What caused the victim's death is not the focus or gravamen of the offense; the focus or gravamen of the offense is that the victim was killed."[117] It is the only thing upon which the jury need unanimously agree.[118] Regardless of whether it is called the "manner and means" or the "fatal act of violence," the way in which the defendant caused the victim's death is not an element of the offense. At best, any posited manners or means merely describe the element of causation.[119] Even so, a variance between the manner and means pled and that proved is never material.[120] As Presiding Judge Keller pointed out, if a variance

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[114] TEX. PENAL CODE § 19.02(b)(2).

[115] 1 CR 10.

[116] *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012).

[117] *Id*.

[118] *Sanchez v. State*, 376 S.W.3d 767, 774 (Tex. Crim. App. 2012) (reh'g).

[119] *Johnson*, 364 S.W.3d at 298.

[120] *Id*.

is never material it is because the underlying allegation is one the State is not required to prove.[121]

How it must be proven.

Not only are "manner and means" not required to be proven, the State need not prove the fact of death by any specific evidence. Even when this Court applies the *corpus delicti* rule in an extrajudicial confession case, "production and identification of the victim's body or remains is not part of the *corpus delicti* of murder."[122]

III. The court of appeals attempts to create a new standard for murder cases.

The court correctly stated the applicable law. . .

The court of appeals dutifully and thoroughly described the law applicable to sufficiency review. It cited and outlined *Jackson*.[123] It discussed the role the hypothetically correct jury charge plays in ensuring the State's burden of proof is not unnecessarily increased.[124] It recognized the jury's role as the sole judge of the weight and credibility of the evidence.[125] It disclaimed the need for "evidence [that] directly proves the defendant's guilt"; circumstantial evidence "is as probative as

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[121] *Moulton v. State*, 395 S.W.3d 804, 811 (Tex. Crim. App. 2013) (Keller, P.J., concurring).

[122] *Fisher v. State*, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993).

[123] *Nisbett*, 2016 Tex. App. LEXIS 13252, at *3-4.

[124] *Id*. at *4.

[125] *Id*. at *5.

direct evidence in establishing guilt."[126] It also acknowledged that the State was entitled to allege an unknown manner and means of commission.[127] With regard to the offense, it saw that murder is a "result of conduct" offense, that intent "is almost always proved by circumstantial evidence,"[128] and that the State was not required to produce a body or remains to prove murder.[129]

. . . before ignoring it completely.

As detailed below, the court of appeals broke most if not all of these rules. But its central problem, one which set the stage for the rest, was its fixation on the State's failure to prove the "fatal act of violence."

The "fatal act of violence."

The requirement of a "fatal act of violence" results from an arbitrary division of the offense of murder (and its evidence) into two categories, much like this Court used to with *corpus delicti* and identity. Rather than consider whether the cumulative weight of the evidence proved the statutory elements of the offense, the court chose

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[126] *Id*. at *5-6 (citing *Carrizales*, 414 S.W.3d at 742), *49.

[127] *Id*. at *31.

[128] *Id*. at *46.

[129] *Id*. at *30.

to separate the offense into the *actus reus* and *mens rea*.[130] These are fine terms that describe fundamental concepts in criminal law but, like *corpus delicti*, serve more to confuse than to help when used in a sufficiency analysis.

In this case, the cognitive dissonance arose early in the court's analysis when it said, "The term 'manner and means' refers to the *actus reus* of the crime, and the jury need not unanimously agree upon the manner and means."[131] Having already said the State must prove the *actus reus*, equating it to a manner and means the State need not prove could not end well:

> So, here, the jury need only unanimously agree that appellant caused Vicki's death. But, what act . . . did appellant commit that caused Vicki's death?[132]

These two sentences directly conflict, and the remainder of the opinion flows from this tension. The lack of a manner of cause of death is the central problem perceived by the court of appeals:

- "The deficiency in the State's evidence is that it did not establish what the fatal act was, how appellant caused Vicki's death."[133]
- "This testimony does not demonstrate a fatal act of violence perpetrated against

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[130] *Id*. at *7.

[131] *Id*. at *31.

[132] *Id*. at *31 (citations omitted).

[133] *Id*. at *34.

Vicki on the day she disappeared."[134]

- "Even if it can be inferred that Vicki is dead, there is no evidence of the criminal act that caused Vicki's death or that appellant perpetrated that criminal act."[135]

Dividing and conquering the elements.

Abandoning a strict review of the elements in favor of broad concepts like *actus reus* and *mens rea* did more than create a burden that does not exist. The court then assigned each piece of evidence to one of the two concepts and then refused to give weight to any surrounding circumstances until the *actus reus*—the "fatal act of violence"—was independently proven:

- "Only once the commission of a crime is established may attempts to conceal incriminating evidence be considered as evidence linking a defendant to the crime that has been established."[136]

- "The lack of evidence of a fatal act renders these [threatening comments] corroborative evidence with nothing (no event or wrongful conduct) to corroborate."[137]

- "Without evidence of that wrongful conduct—a fatal act perpetrated by appellant against Vicki—these suspicious behaviors have nothing to

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134 *Id*. at *34.

135 *Id*. at *44-45.

136 *Id*. at *40.

137 *Id*. at *41.

corroborate."[138]

- "[W]hile evidence of motive helps link a defendant to wrongful conduct or is supportive of other evidence of such conduct, 'without evidence that wrongful conduct has occurred, there is nothing for motive . . . evidence to link the defendant to.'"[139]

Requiring specific evidence to prove intent.

The court's framework to this point has obvious flaws, but there is a separate, more specific problem. The court alternatively held that, even if the evidence proved beyond a reasonable doubt that appellant caused the victim's death, the State failed to prove *mens rea*.[140]

As noted above, the court of appeals recognized that mental state is almost always proven by circumstantial evidence. It listed a number of ways in which it is commonly proven but found none of them in this case:

> Without evidence of how appellant caused Vicki's death, his mental state cannot be gleaned from the act or conduct itself or any associated words. Vicki's body has never been found and no autopsy has been performed, so no evidence exists concerning the types of injuries purportedly inflicted upon Vicki. Without evidence of the injuries, there is no way to discern the method of producing fatal injuries, how such injuries were inflicted, or the extent of the injuries. Thus, the jury could

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[138] *Id*. at *44.

[139] *Id*. (quoting *Stobaugh v. State*, 421 S.W.3d 787, 865 (Tex. App.–Ft. Worth 2014, pet. ref'd)).

[140] *Id*. at *45. This argument, and most of the court of appeals's analysis, is attributable to *Stobaugh*, another missing-body case in which the Second Court found the evidence sufficient to prove the victim's death and Stobaugh's motive and opportunity but insufficient to prove the requisite intent without evidence of the act he committed to cause her death.

> not infer appellant's mental state from facts relating to the injuries as none were shown. Further, the record contains no evidence that a deadly weapon was used; thus, no deadly-weapon facts exist from which the jury could infer appellant's intent.[141]

Importantly, the court made it clear that there is not just legally insufficient evidence to prove intent—there is literally no evidence:

- "Evidence and facts from which to infer appellant's mental state *do not exist* in the record before us. . . . There are simply no facts from which the jury could infer appellant's intent."[142]

- "[Even if it could be shown that appellant caused the vicitm's death,] *no facts or evidence exist* from which the jury could—based on these inferences and the surrounding circumstances—also have reasonably inferred that while that something was occurring, appellant possessed the requisite mens rea for the offense of murder."[143]

- The evidence "nonetheless *wholly failed* to provide the jury with *any facts* from which the jury could also reasonably infer that the *mens rea* appellant possessed when he did that something to Vicki was the requisite *mens rea* for murder, as opposed to some other *mens rea*."[144]

Not surprising given the preceding sufficiency analysis, the State's complete failure of proof boils down to the absence of a fatal act of violence: "[B]ecause there is no evidence of a specific death-causing act, no facts exist in the record concerning appellant's conduct from which the jury could have reasonably inferred that appellant

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[141] *Id*. at *47-48.

[142] *Id*. (emphasis added).

[143] *Id*. at *48-49 (emphasis added).

[144] *Id*. at *49 (emphasis added).

possessed the requisite mental state to support a conviction for murder."[145] In short, the court of appeals can see no way to prove intent other than through eye-witness testimony or physical evidence directly related to the body itself.

The "internal" analysis is bad, too.

Within the segregation inherent in the court of appeals's overarching framework are the more typical mistakes: the "divide and conquer" approach to the evidence and a general disregard for the jury's prerogative to determine credibility, weigh evidence, and draw inferences.

The court's analysis is a succession of isolated consideration of specific pieces or types of evidence combined with the conclusion that each does not independently establish the made-up "fatal act of violence" element. For example:

- "However, the fact that appellant cashed a check on Vicki's account after she disappeared or that he had access to Vicki's car after her disappearance does not demonstrate that appellant perpetrated a fatal act against Vicki in her apartment the night she disappeared."[146]
- "Such suspicious behavior after the fact might corroborate evidence of wrongful conduct; it cannot alone establish that wrongful conduct."[147]
- "However, this suspicious behavior does not, by itself, demonstrate that appellant perpetrated a fatal act against Vicki nor is it sufficient to support an

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[145] *Id*. at *51-52.

[146] *Id*. at *39.

[147] *Id*.

inference that the commission of a separate crime or wrongful conduct has occurred."[148]

- "While these threatening comments raise suspicions about appellant, they fail to demonstrate that appellant perpetrated a fatal act against Vicki in her apartment that night."[149]

- "As with attempts to conceal evidence, the utterance of false statements or inconsistent statements is, by itself, not sufficient to support an inference that the commission of a separate crime or wrongful conduct has occurred."[150]

- "By itself, the evidence of these suspicious behaviors does not support an inference that appellant engaged in the wrongful conduct alleged against him."[151]

The result of two rounds of division—once when the offense was broken into quasi-elements, and again when the evidence was viewed piecemeal—result in a sometimes stunning view of the evidence that either assigns no value to much of it or draws irrational conclusions therefrom. For example:

- "The State's primary source of evidence that Vicki was dead was the absence of evidence showing that she is alive—that is, the fact that she had no 'electronic footprint' consistent with everyday living after December 14, 1991."[152]

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[148] *Id*. at *40.

[149] *Id*. at *41.

[150] *Id*. at *42 (quotation omitted).

[151] *Id*. at *44.

[152] *Id*. at *30.

How does the court know what the jury considered the "primary source"? Even within the court's framework, which ignores evidence like the assault and bloody hand print, the absence of an "electronic footprint" is only "primary" if one also ignores the evidence that the victim never would have abandoned her family or friends. Elevating one diminishes the other, and is inconsistent with viewing the evidence in the light most favorable to the verdict.

- "The State maintains that this evidence of 'unusual cessation of contact' by Vicki constituted additional circumstantial evidence demonstrating appellant's guilt. However, while this evidence undoubtedly raises suspicions about Vicki's disappearance, it does not constitute evidence that she is in fact deceased. Moreover, *even if* the inference can be made that the absence of evidence of active living means she is dead, this evidence still does not show how Vicki died or who caused her death."[153]

Even when the court considers the cessation, it is reluctant to entertain reasonable inferences. It is not charitable to say that over two decades of absence and the unexpected and complete lack of contact with loved ones *might* raise an inference that the victim is dead. And, of course, the State did not rely exclusively on any one piece of evidence to establish appellant's culpability.

- "The cleanliness of Vicki's apartment—even if it was the result of appellant's nefarious cleaning in an attempt to hide or remove evidence—does not *in any way* demonstrate that appellant perpetrated a fatal act against Vicki in the

[153] *Id*. at *37-38 (emphasis added).

apartment *or support an inference of such*."[154]

If by "demonstrate" the court of appeals means "prove conclusively," that is true as far as it goes. But to say that a "nefarious . . . attempt to hide or remove evidence" is no evidence of criminal wrongdoing is just wrong.

- "[T]here is no evidence demonstrating what that 'foul play' was. Was it some act that caused an injury that resulted in fatal blood loss? . . . [But] the testimony of the State's experts indicated that there was not enough blood in the samples from the apartment to demonstrate a fatal blood loss."[155]

The State did not have to prove what the "foul play" was, so it did not have to prove fatal blood loss. But if it had to, a rational jury could have disregarded the lack of remaining blood (assuming it found those experts credible) because 1) the scene was thoroughly cleaned by appellant, and 2) there had been enough of her blood to soak through the pad and for appellant to make a bloody hand print.

- "Tower testified that Vicki was 'hysterical,' that she heard appellant and Vicki arguing [that evening], and that Vicki reported that appellant had choked her. While this testimony does indicate that appellant committed an act of violence toward Vicki, it also established that Vicki was still alive after the choking incident. . . . This circumstantial evidence does not support an inference that appellant is guilty of Vicki's murder; rather it directly refutes an element of the offense necessary to prove his guilt—that his act caused her death."[156]

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[154] *Id*. at *36-37 (emphasis added).

[155] *Id*. at *31-32.

[156] *Id*. at *35.

So the fact that appellant was both verbally aggressive and physically violent towards the victim on the day she disappeared tends to prove he did not kill her? A rational jury would disagree.

And there are numerous examples of less egregious errors that, when viewed cumulatively, reveal re-weighing of the evidence or at least a neutrality akin to factual sufficiency review. For example, when discussing the multiple times appellant told people he thought about killing the victim, the court added, "The evidence also reflected that neither of these men [to whom appellant spoke] took appellant's comments to be serious threats to Vicki."[157] The jury could have disregarded that last bit simply because it is their prerogative, or could have determined that the witnesses said it out of guilt for having failed to "see the signs." Mentioning it, like detailing "the jury's struggle" to reach a verdict,[158] only serves to diminish the weight of the evidence supporting the verdict in the mind of the reader. Neither has any place in a *Jackson* review.

The problems in this case are not really new.

Although the language used by the court of appeals, especially "fatal act of violence," is novel, the ideas put into practice are not. They have been rejected on

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[157] *Id*. at *41.

[158] *Id*. at *50 n.14.

multiple fronts.

This is a rehashed corpus delicti analysis.

While the court of appeals mentions the "*corpus delicti* of murder" only once,[159] it is clear that its approach is a not-so-fresh take on it. Instead of dividing the offense into criminal loss and identity, it divided it into the analogues of conduct and mental state. In either case, the result is the same: the court did not ask whether the evidence collectively shows appellant intentionally or knowingly caused the victim's death (or the (b)(2) equivalent). Instead, it asked a series of—in its mind—unrelated questions: Is the victim dead? If so, was it criminal? If so, was it appellant? If so, what was his intent? And it refused to consider evidence related to identity or motive until separate evidence proved the victim died as a result of criminal conduct. This arbitrary division of the State's burden, followed by the arbitrary division of the evidence, is exactly what was forbidden by *Carrizales*, a case the court of appeals cited twice.[160]

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[159] *Id*. at *45 (quoting *McDuff*, 939 S.W.2d at 615).

[160] *Nisbett*, 2016 Tex. App. LEXIS 13252, at *6, 49. Carrizales argued that evidence of identity—motive and opportunity—could not be used to prove an offense was committed. 414 S.W.3d at 744. "Au contraire[,]" said the Court: "The court of appeals . . . was entitled to consider the logical force of all the circumstantial evidence as it pertained to each element of criminal mischief—including criminal intent." *Id*.

This Court rejected the need for specific evidence in McDuff.

The court of appeals is also not the first to propose a rigid evidentiary requirement for this type of case. McDuff insisted that where there is no body, no confession, and no non-accomplice testimony of the death and cause of death, there is a failure of proof of the *corpus delicti* of homicide.[161] Although this Court would not couch the analysis in terms of *corpus delicti* today, the facts needed to be proved were just as succinctly put as they are now: "the State must show the death of the named complainant caused by the criminal act of appellant."[162]

Because it reaffirmed the general rule that "the State is not required to produce and identify the body or remains of the decedent," this Court did not elaborate on its rejection of McDuff's assertion "a definitive determination of death and cause of death is not possible" without it.[163] The Court did, however, specifically address whether accomplice witness testimony is competent to prove death:

> We see no reason to exclude accomplice witness testimony in determining whether the *corpus delicti* has been established. Appellant is unable to cite any constitutional, statutory, or caselaw requirement that accomplice witness testimony be corroborated before it can be considered in determining whether the *corpus delicti* has been

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[161] *McDuff*, 939 S.W.2d at 614.

[162] *Id*. In three other places in the opinion the Court more accurately defined the *corpus delicti* of murder as the fact that "another" caused a death by criminal act, not necessarily the appellant. *Id*. at 614-15.

[163] *Id*. at 614.

> established, thus we decline to require such corroboration in making such a determination. Accordingly, in resolving appellant's points of error claiming legal insufficiency of evidence to prove *corpus delicti*, we shall consider all of the evidence, including accomplice witness testimony.[164]

As with its rejection of other arbitrary constructs and rules, the Court immediately cited and discussed *Jackson*'s directive to "consider *all* of the evidence" when evaluating the sufficiency of the evidence, and to view it in the light most favorable to the prosecution.[165]

There is no "best evidence" rule for intent.

The court of appeals provided a short list of specific circumstantial evidence—fatal act of violence, words spoken at the time, types of injuries, use of a deadly weapon—from which the jury could infer appellant's intent. It effectively requires a confession, video, testimony of one who "witnessed the assault and observed the infliction of fatal injuries,"[166] or "direct circumstantial evidence," *i.e.*, surrounding circumstances inexorably linked to his mental state at the moment death was caused. This is wrong on principle and in practice.

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[164] *Id*. at 614.

[165] *Id*. (emphasis in original). "All" is italicized three times in the four sentences discussing *Jackson*. *Id*.

[166] *Nisbett*, 2016 Tex. App. LEXIS 13252, at *29 (distinguishing *McDuff*).

First, there is "no 'best evidence' rule in Texas" for what must be proven.[167] A scheme that completely discounts circumstantial evidence not immediately associated with the murder would effectively insulate careful (or lucky) murderers from conviction. If the murder occurs without witnesses or an accomplice, then, a successful clean-up ensures a clean getaway. No amount of motive, opportunity, threats, prior violence, false alibis, shovels, lime, acid, or flight would mean anything. As Judge Baird wrote, "The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward."[168]

Second, the evidence on the court's short list does not even satisfy its own requirement that intent or knowledge be shown "as opposed to some other *mens rea*." Even if a body is recovered and a medical examiner testifies that the autopsy revealed a single gunshot wound to the chest at close range, that does not preclude negligence or recklessness on the defendant's part. It does not even preclude suicide. While it would certainly be probative, that evidence would have to be combined with surrounding circumstances, the relationship between the victim and the defendant, the crime scene, etc. for a jury to make that decision. That is the type of evidence

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[167] *See Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007) (disclaiming the need for a specific document or mode of proof to prove a prior conviction).

[168] *McDuff*, 939 S.W.2d at 622-23 (Baird, J., concurring) (citation omitted).

contemplated by Code of Criminal Procedure Article 38.36.[169] And it is the very evidence ignored in this case.

IV. The evidence is sufficient.

Appellant said he would kill his wife if she tried to leave him and take the kids. She left him and took the kids. Already unhappy about the pending divorce, he was more upset when he found out she began dating. It came to a head that day. Appellant did not want her to go out or to talk to her girlfriend, and he choked her after she spoke with the man she started dating. What exactly happened next is unknown, but she bled enough for it to soak through the closet carpet and cover appellant's hand (at least). He then borrowed a neighbor's car, jimmied the trunk lock, and brought it back after an hour and a half looking like it had driven through the woods.

Appellant lied about leaving the apartment that night. Although he successfully disposed of Vicki's body, his attempt to sanitize the murder scene was unsuccessful. He was nervous about the search of her apartment. He did not want her car found and refused to allow it to be searched because her checkbook proved

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[169] TEX. CODE CRIM. PROC. art. 38.36(a) ("In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.").

he had her car after she disappeared. He lied about hiring an investigator. And he was far more concerned with his financial reputation than the murder accusation, never once telling his brother he was innocent.

Vicki had children, family, and friends she loved. She had plans for the future, not only that night but with the new man in her life. She did not suddenly give all of that up and disappear without any belongings or financial arrangements only to randomly leave her car at a nearby HEB two months later. She was killed by the last person to see her, a man who said he would do it, who assaulted her earlier that night, who left his mark in her blood, and who tried very hard to cover it up.

The State did not have to prove how appellant caused Vicki's death, although it would be rational to infer that massive blood loss played a role. It did not have to prove where her body is, although both the undeveloped woods of Williamson County and his brother's property would have been excellent places to hide a body.[170] It did not have to prove who drove and then hid her car to make it look like she ran off, although there was time for appellant to temporarily hide a body nearby using his neighbor's car and then drive her car north on Highway 183 after putting his young kids to bed. The State needed none of these facts to prove any element of the offense, including intent. Given the cumulative force of the surrounding circumstances—their

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[170] Appellant did not have to decide on a permanent solution that night.

rocky history, the violence earlier that day, the successful disposal of her body, and his attempts to further conceal his crime, to name a few—the evidence is sufficient to prove he caused Vicki's death intentionally or knowingly, or at least intended to cause serious bodily injury and committed an act clearly dangerous to human life.

This is not, as the court of appeals argued, a case like *Hacker v. State* in which there is literally no evidence other than opportunity and "mere 'suspicion linked to other suspicion.'"[171] Nor is it, as the court suggested, like *Walker v. State*, a case with multiple suspects, a messy set of facts, and a questionable treatment of expert testimony.[172] Viewed in the light most favorable to the verdict, the evidence supports the jury's conclusion that the State proved what it needed to prove—appellant intentionally or knowingly caused Vicki's death.

V. Conclusion

At every phase of its analysis, the court of appeals ignores what this Court has repeatedly made clear: the sole test for legal sufficiency is that set forth in *Jackson v. Virginia*. Post-*Jackson*, there is no room for "helpful analytical constructs" that warp the State's burden or add artificial limitations or requirements. This Court has

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[171] *Nisbett*, 2016 Tex. App. LEXIS 13252, at *50 (quoting *Hacker v. State*, 389 S.W.3d 860, 874 (Tex. Crim. App. 2013)). In *Hacker*, this Court held that prohibited contact with the victim could not be proven based solely on inference from co-habitation. 389 S.W.3d at 864.

[172] *Nisbett*, 2016 Tex. App. LEXIS 13252, at *52 n.15 (discussing *Walker v. State*, Nos. PD-1429-14, PD-1430-14, 2016 Tex. Crim. App. Unpub. LEXIS 973 (Tex. Crim. App. Oct. 19, 2016) (not designated for publication)).

rejected the circumstantial evidence instruction, the reasonable alternative hypothesis rule, and the old "*corpus delicti*" view of the elements, all because they distract from or plainly contradict *Jackson*. It should stop this "fatal act of violence" requirement—and all the analytical miscues it creates—before it spreads any further.

"Just as there is more than one way to skin a cat,"[173] there is more than one way to prove a murder. Calling it "speculation" any time favored circumstantial evidence is absent only serves to reward criminals. There may be no body in this case, no eyewitness, and a number of questions to which there are no answers. But what strong circumstantial evidence there is, viewed properly, supports the jury's verdict.

[173] *Flowers*, 220 S.W.3d at 922 (applying this saw to prior convictions).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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The undersigned hereby certifies that on this 11th day of September, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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